Supreme Court, U.S.
FILED
94 922 NOV 2 1 1994
OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1994

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

v.

JAMES KING ANDERSON, III,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE MICHIGAN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

FRANK J. KELLEY
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, MI 48909
(517) 373-1124

Mark S. Mackley
Prosecuting Attorney

J. Ronald Kaplansky
Catherine Langevin Semel
Assistant Attorneys General

Attorneys for Petitioner

137pp

QUESTIONS PRESENTED

I.

DOES THE SIXTH AMENDMENT RULE EXPRESSED IN MICHIGAN v. JACKSON, 475 U.S. 625 (1986), HOLDING THAT "IF POLICE INITIATE INTERROGATION AFTER A DEFENDANT'S ASSERTION, AT AN ARRAIGNMENT OR SIMILAR PROCEEDING, OF HIS RIGHT TO COUNSEL, ANY WAIVER OF THE DEFENDANT'S RIGHT TO COUNSEL FOR THAT POLICE-INITIATED INTERROGATION IS INVALID," APPLY WHERE THERE HAS BEEN A BREAK IN CUSTODY BETWEEN DEFENDANT'S ARRAIGNMENT AND REQUEST FOR COUNSEL AND THE SUBSEQUENT COMMUNICATION?

II.

DID THE MICHIGAN SUPREME COURT INCORRECTLY CONCLUDE THAT POLICE HAD "INITIATED COMMUNICATION" WITH DEFENDANT, WITHIN THE MEANING OF MICHIGAN v. JACKSON, 475 U.S. 625 (1986), WHERE THE CIRCUIT COURT FOUND THAT POLICE HAD CONTACTED DEFENDANT THE DAY BEFORE HIS ARRAIGNMENT TO MAKE ARRANGEMENTS FOR THE POLYGRAPH EXAMINATION, AND THE POLICE WERE MERELY FINALIZING DEFENDANT'S PRE-ARREST REQUEST FOR A POLYGRAPH EXAMINATION, WHICH RIGHT IS GUARANTEED HIM BY MICHIGAN LAW?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

INDEX OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 12

I. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THAT THE SIXTH AMENDMENT RULE EXPRESSED IN MICHIGAN v. JACKSON, 475 U.S. 625 (1986), HOLDING THAT "IF POLICE INITIATE INTERROGATION AFTER A DEFENDANT'S ASSERTION, AT AN ARRAIGNMENT OR SIMILAR PROCEEDING, OF HIS RIGHT TO COUNSEL, ANY WAIVER OF THE DEFENDANT'S RIGHT TO COUNSEL FOR THAT POLICE-INITIATED INTERROGATION IS INVALID," DOES NOT APPLY WHERE THERE HAS BEEN A BREAK IN CUSTODY BETWEEN DEFENDANT'S ARRAIGNMENT AND REQUEST FOR COUNSEL AND THE SUBSEQUENT COMMUNICATION 14

Page

II. CERTIORARI SHOULD BE GRANTED TO CLARIFY THAT COMMUNICATION IS NOT "INITIATED" BY THE POLICE WITHIN THE MEANING OF MICHIGAN v. JACKSON WHERE THE POLICE HAD CONTACTED DEFENDANT THE DAY BEFORE HIS ARRAIGNMENT TO MAKE ARRANGEMENTS FOR THE POLYGRAPH EXAMINATION, AND THE POLICE WERE MERELY FINALIZING DEFENDANT'S PRE-ARREST REQUEST FOR A POLYGRAPH EXAMINATION, WHICH RIGHT IS GUARANTEED HIM BY MICHIGAN LAW 21

CONCLUSION 23

RELIEF 24

INDEX OF AUTHORITIES

Pages

Cases

Adams v. United States ex rel McCann, 317 U.S. 269 (1942) 20

Arizona v. Roberson, 486 U.S. 675 (1988) 16,17

Brown v. State, 661 P.2d 1024 (Wyo. 1983) 17,18

Dunkins v. Thigpen, 854 F.2d 394 (11th Cir. 1988) ... 17

Edwards v. Arizona, 451 U.S. 477 (1981) 15-17,19

McFadden v. Garraghty, 820 F.2d 654 (4th Cir. 1987) 17

McNeil v. Wisconsin, 501 U.S. 171 (1991) 18

Michigan v. Harvey, 494 U.S. 344 (1990) 15,20

Michigan v. Jackson, 475 U.S. 625 (1986) .....passim

Minnick v. Mississippi, 498 U.S. 146 (1990) 17

Miranda v. Arizona, 384 U.S. 436 (1966) 15

Patterson v. Illinois, 487 U.S. 285 (1988) 9

People v. Bladel (After Remand), 421 Mich. 39; 365 N.W.2d 56 (1984) 8,9,12

Pages

People v. Crusoe, 433 Mich. 666; 449 N.W.2d 641 (1989) 18

People v. Sterling, 154 Mich. App. 223; 397 N.W.2d 182 (1986) 13

People v. Trujillo, 773 P.2d 1086 (Colo. 1989) 17

State v. Bymes, 258 Ga. 813; 375 S.E.2d 41 (Ga. 1989) 17

State v. Norris, 244 Kan. 326; 768 P.2d 296 (Kan. 1989) 19

United States v. Fairman, 813 F.2d 117 (7th Cir.), cert. denied, 483 U.S. 1010 (1987) 17

United States v. Skinner, 667 F.2d 1306 (9th Cir. 1982), cert. denied, 463 U.S. 1229 (1983) 17

Constitution

U.S. Const. Amend. VI 2,12

Statutes and Rules

28 U.S.C. § 1257(a) 2

Mich. Comp. Laws, § 750.520b 7

Mich. Comp. Laws, § 776.21(5) 13

OPINIONS BELOW

The opinion of the Michigan Supreme Court has not yet been reported and is reprinted in the appendix hereto. App. to Pet. 1a.

The unpublished findings of the Michigan circuit court, on remand from the Michigan Supreme Court, are reprinted in the appendix hereto. App. to Pet. 33a.

The opinion of the Court of Appeals, on remand from the Michigan Supreme Court, has not been reported and is reprinted in the appendix hereto. App. to Pet. 73a.

The opinion of the Michigan Court of Appeals has not been reported and is reprinted in the appendix hereto. App. to Pet. 89a.

JURISDICTION

The Michigan Supreme Court decision was entered on August 26, 1994. Petitioner seeks review of the judgment under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

Amendment VI of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

The defendant first came under investigation in this matter on May 19, 1988, as the result of a complaint received by the Kalkaska County Sheriff's Department from the Michigan Department of Social Services. The complaint alleged that defendant had sexually molested his then nine-year-old daughter, Peggy Beaver. (Evidentiary Hearing Tr. 19.)

On May 23, 1988, Detective-Sergeant Bruce Gaultiere met with the defendant at the Kalkaska County Sheriff's Office and confronted him with the allegations made against him. During that conversation, defendant denied the charges and requested that he be allowed to take a polygraph examination. Detective Gaultiere offered to provide transporta-

tion if needed. At the conclusion of the interview, defendant was arrested pursuant to an outstanding warrant for the offense. On May 24, 1988, defendant was released on bond. (Evidentiary Hearing Tr. 19-21, 23; Circuit court findings 2; App. to Pet. 35a.)

On either May 23 or May 24, 1988, Detective Gaultiere requested that a polygraph examination be scheduled for the defendant. On May 25, 1988, he received confirmation that the polygraph could be held on June 2, 1988, and that same day, he left either an oral or written message at defendant's residence informing him of the date of the polygraph and reissuing his invitation to provide transportation if needed. Sometime between May 25 and June 2, 1988,

defendant contacted Detective Gaultiere, stated that he would take the polygraph, and they made arrangements to meet on June 2, 1988, so that Detective Gaultiere could transport defendant to the site of the polygraph test. (Evidentiary Hearing Tr. 23-24; Circuit court findings 2; App. to Pet. 35a-36a.)

On May 26, 1988, defendant was arraigned and counsel was appointed him at that hearing. The defendant made no attempt to contact that attorney prior to the June 2, 1988 polygraph exam or prior to June 6, 1988. (Evidentiary Hearing Tr. 50; Circuit court findings 4; App. to Pet. 36a.)

On June 2, 1988, defendant met Gaultiere and they traveled to the polygraph site together. Once there, defen-

dant was given his full Miranda rights, and he signed a waiver form. Upon leaving the site and returning to Detective Gaultiere's car, Detective Gaultiere told defendant that he wished to speak to him further regarding the charges and asked him if he remembered the rights of which he had just been apprised. In the course of the ride home, Detective Gaultiere then asked defendant several questions, to which defendant responded. Defendant's responses included the statement that he had in the past had sexual thoughts about his daughter but that as soon as he became aware of them he'd attempt to put them out of his head. (Trial Tr. Vol. II, p 49.) The entire elapsed time between defendant's initial Miranda warnings and Detective Gaultiere's questions was approximately two hours. (Evidentiary

Hearing Tr. 23, 25, 28; Circuit court findings 3; App. to Pet. 37a-39a.)

At trial, defendant challenged the admissibility of the statement made to Detective Gaultiere in the car, arguing that it had been elicited in violation of defendant's Sixth Amendment right to counsel. The issue was addressed on a separate record, and the circuit judge found that the statements were admissible at trial because they had been made following a valid waiver of defendant's Miranda rights. (Evidentiary Hearing Tr. 44.)

Defendant was convicted of first-degree criminal sexual conduct, Mich. Comp. Laws, § 750.520b. In an unpublished opinion, the Michigan Court of Appeals affirmed the conviction, holding

that the admission of the statement was not in error, where defendant had not requested counsel during the questioning, and where defendant had been read his Miranda rights and had waived them one hour earlier. (Slip op. at 3; App. to Pet. 102a-103a.)

The Michigan Supreme Court vacated that decision and remanded the case to the Court of Appeals for reconsideration in light of the Michigan Supreme Court's decision in People v. Bladel (After Remand), 421 Mich. 39; 365 N.W.2d 56 (1984), aff'd sub nom. Michigan v. Jackson, 475 U.S. 625 (1986), and to determine, if any error occurred, whether it was harmless. App. to Pet. 87a.

On remand, the Court of Appeals once again affirmed the conviction. Without

addressing the substance of the Sixth Amendment issue, the Court of Appeals held that, regardless, any error was harmless in light of the other evidence against the defendant. (Slip op. at 2-3; App. to Pet. 80a-84a.) The Michigan Supreme Court first denied appeal, App. to Pet. 71a, then granted both a motion for reconsideration and leave to appeal. App. to Pet. 68a.

Following oral arguments, the Michigan Supreme Court, while retaining jurisdiction, remanded the case to the circuit court to conduct an evidentiary hearing in light of People v. Bladel (After Remand), supra, and Patterson v. Illinois, 487 U.S. 285 (1988), and specifically, to determine whether defendant initiated the request for the poly-

graph exam and, if so, whether defendant waived his right to counsel at the polygraph exam and whether the waiver, if any, extended to the subsequent questioning of defendant in the police car. App. to Pet. 58a.

Following an evidentiary hearing, at which Detective Gaultiere was the primary witness, the circuit court found that defendant had initiated the request for a polygraph exam pre-arrest and pre-arraignment but post-custody. (Circuit court findings, 4; App. to Pet. 40a.) The court also found that post-arrest and post-arraignment defendant had "re-initiated or elected to proceed with the polygraph process by doing everything necessary to accomplish the exam." (Id.) The court took special notice of the fact

that defendant "was at liberty at all times after a lawyer was made available to him," and that he had "ample opportunity to consult with counsel and apparently chose not to do it." (App. to Pet. 41a.) The court also found that defendant had validly waived his rights prior to the polygraph, and that this waiver, given the reminder by Detective Gaultiere, carried over to the questioning occurring in the car. (Id. at 8; App. to Pet. 49a-51a.)

The Michigan Supreme Court held that only post-arraignment "initiation" was pertinent and found that Detective Gaultiere had initiated the communication with defendant following his arraignment. (Slip op. at 17-18; App. to Pet. 17a.) The court also found that the error was not harmless. (App. to Pet. 20a.)

REASONS FOR GRANTING THE WRIT

The Michigan Supreme Court's decision relied solely on its prior ruling in People v. Bladel (After Remand), 421 Mich. 39; 365 N.W.2d 56 (1984), aff'd sub nom. Michigan v. Jackson, 475 U.S. 625 (1986), and U.S. Const. Amend. VI.

The Michigan Supreme Court has misapplied this Court's decision in Michigan v. Jackson, where the defendant had remained in continuous custody before waiving his right to counsel, to strike down a criminal conviction of a defendant whose waiver followed a break in custody. The Michigan court's expansion of this Court's Jackson rule is neither warranted nor desirable and presents an important question of federal constitutional law which should be reviewed by this Court.

Furthermore, the facts suggest that police officers did not initiate contact with the defendant post-arraignment, that the police's communication with regard to the polygraph test was made prior to defendant's arraignment and, further, that in contacting defendant, the police were merely honoring defendant's pre-arrest request for a polygraph test, which right defendant is guaranteed under Michigan law, Mich. Comp. Laws, § 776.21(5); People v. Sterling, 154 Mich. App. 223, 233-234; 397 N.W.2d 182 (1986).

I.

THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THAT THE SIXTH AMENDMENT RULE EXPRESSED IN MICHIGAN v. JACKSON, 475 U.S. 625 (1986), HOLDING THAT "IF POLICE INITIATE INTERROGATION AFTER A DEFENDANT'S ASSERTION, AT AN ARRAIGNMENT OR SIMILAR PROCEEDING, OF HIS RIGHT TO COUNSEL, ANY WAIVER OF THE DEFENDANT'S RIGHT TO COUNSEL FOR THAT POLICE-INITIATED INTERROGATION IS INVALID," DOES NOT APPLY WHERE THERE HAS BEEN A BREAK IN CUSTODY BETWEEN DEFENDANT'S ARRAIGNMENT AND REQUEST FOR COUNSEL AND THE SUBSEQUENT COMMUNICATION.

In Jackson, supra, this Court declared that "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." (Id. at 636.) The rationale behind this rule is that any waiver of the right to counsel, after a defendant has previously declined to proceed with-

out counsel, is inherently suspect, and it is only a defendant-initiated contact that can overcome the suspect nature of a subsequent waiver of rights, where the defendant's attorney is not present. Michigan v. Harvey, 494 U.S. 344, 350 (1990).

The Jackson rule, although expressed in Sixth Amendment terms, originated in Edwards v. Arizona, 451 U.S. 477 (1981), in the context of the Fifth Amendment right to counsel and was applied to the Sixth Amendment by analogy. Indeed, this Court has stated that, while the Jackson rule is based on the Sixth Amendment, it is actually rooted in Miranda v. Arizona, 384 U.S. 436 (1966). Harvey, supra, at 349. Accordingly, the focus of the Jackson rule is not upon the right to

counsel per se, but rather concerns the manner in which that right, once asserted, may validly be waived.

Because Jackson, like Edwards, focuses upon the concern that those suspects subjected to "prolonged police custody" may be "badgered" into relinquishing their rights, Arizona v. Roberson, 486 U.S. 675, 677 (1988), the continuous custody of the defendant is a vital component of the rule. In each of the pertinent cases reviewed by this Court, under both the Fifth and Sixth Amendments, where this Court has found a police-initiated communication following a request for counsel to invalidate the subsequent waiver of rights, the defendant has been subject to continuous police custody during the intervening

period. See Minnick v. Mississippi, 498 U.S. 146, 148-149 (1990); Roberson, supra, at 678; Jackson, supra, at 627-628; Edwards, supra, at 479.

In the Fifth Amendment context, many jurisdictions have recognized that a break in custody dissolves a defendant's Edwards claim. Dunkins v. Thigpen, 854 F.2d 394, 397 (11th Cir. 1988); McFadden v. Garraghty, 820 F.2d 654, 661 (4th Cir. 1987); United States v. Fairman, 813 F.2d 117, 125 (7th Cir.), cert. denied, 483 U.S. 1010 (1987); United States v. Skinner, 667 F.2d 1306, 1309 (9th Cir. 1982), cert. denied, 463 U.S. 1229 (1983); People v. Trujillo, 773 P.2d 1086, 1091-1092 (Colo. 1989); State v. Bymes, 258 Ga. 813; 375 S.E.2d 41, 41-42 (Ga. 1989); Brown v. State, 661 P.2d

1024, 1029 (Wyo. 1983); see also, People v. Crusoe, 433 Mich. 666, 670; 449 N.W.2d 641 (1989) (recognizing the continuous custody requirement where a defendant is interrogated on two separate charges) This Court suggested as much in McNeil v. Wisconsin, 501 U.S. 171, 177 (1991), where it stated, with regard to the Edwards rule, "If the police do subsequently initiate an encounter in the absence of counsel (assuming there has been no break in custody), the suspect's statements are presumed involuntary and therefore inadmissible as substantive evidence at trial. . . ." (Emphasis added.)

While few jurisdictions have addressed the issue of continuous custody in the Sixth Amendment context, at least

one court has addressed and applied the "break in custody" exception to a Jackson rule analysis. State v. Norris, 244 Kan. 326; 768 P.2d 296, 332 (Kan. 1989). Because of the duality of purpose between the Edwards rule and the Jackson rule, there is no reason for the exception to apply in one instance but not the other.

By disregarding the lack of continuous custody in this case, the Michigan Supreme Court has extended Jackson beyond its intended and desirable parameters. Whatever need there may be for a prophylactic rule when a defendant is subject to continuous custody is simply not present when a defendant has been released on bond and is free to consult with an attorney or friends and family if he chooses to do so.

This Court has recently observed, "To hold a defendant is inherently incapable of relinquishing his right to counsel once it is invoked would be 'to imprison a man in his privileges and call it the Constitution.'" Harvey, supra, at 353, quoting Adams v. United States ex rel McCann, 317 U.S. 269, 280 (1942). Similarly, this Court should recognize the autonomy of an individual to elect, intelligently and voluntarily, to proceed without counsel in an instance when the defendant has been free from police custody, when he has had ample time to consult with an attorney, and where he has prior experience with the law. In such circumstances, the prophylactic Jackson rule is neither warranted nor desirable.

II.

CERTIORARI SHOULD BE GRANTED TO CLARIFY THAT COMMUNICATION IS NOT "INITIATED" BY THE POLICE WITHIN THE MEANING OF MICHIGAN v. JACKSON WHERE THE POLICE HAD CONTACTED DEFENDANT THE DAY BEFORE HIS ARRAIGNMENT TO MAKE ARRANGEMENTS FOR THE POLYGRAPH EXAMINATION, AND THE POLICE WERE MERELY FINALIZING DEFENDANT'S PRE-ARREST REQUEST FOR A POLYGRAPH EXAMINATION, WHICH RIGHT IS GUARANTEED HIM BY MICHIGAN LAW.

Even were Jackson to apply, the Michigan Supreme Court misconstrued this Court's meaning of the word "initiation" in Jackson in finding that Detective Gaultiere had "initiated" contact with defendant post-arraignment and following his request for counsel. The findings of the circuit court indicate that Detective Gaultiere contacted defendant about the polygraph test on May 25, 1988, the day before defendant's arraignment. Defendant then contacted Detective Gaultiere sometime between May 25 and June 2 to

confirm that he would attend the polygraph examination and to arrange for transportation. The police made no subsequent communication with defendant until Detective Gaultiere picked him up at the arranged spot. Hence, if anyone "initiated" contact post-arraignment it was the defendant. Furthermore, any communications that police did make were merely in regard to arrangements that had been made prior to defendant's arrest and arraignment.

CONCLUSION

The defendant's Sixth Amendment rights were not violated. The break in custody between the prearranged polygraph test, the arraignment and the defendant's subsequent and voluntary contact with the police, at which time he made a statement, with full knowledge of his rights, is completely unrelated to the situation presented in Michigan v. Jackson, supra.

The Michigan Supreme Court incorrectly concluded that the defendant's rights were violated within the meaning of Michigan v. Jackson, supra, where a prearranged meeting with the police for the purposes of taking a polygraph examination, to which the defendant was entitled by state statute, was finalized.

RELIEF

For the foregoing reasons, Petitioner requests that the Writ of Certiorari issue to review the judgment of the Michigan Supreme Court.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, MI 48909
(517) 373-1124

Mark S. Mackley
Prosecuting Attorney

J. Ronald Kaplansky
Catherine Langevin Semel
Assistant Attorneys General

Attorneys for Petitioner

November, 1994

APPENDIX

TABLE OF CONTENTS

Page

Michigan Supreme Court opinion dated August 26, 1994 ..... 1a

Kalkaska County Circuit Court opinion dated May 17, 1994 ..... 33a

Michigan Supreme Court remand order dated March 25, 1994 ..... 58a

Michigan Supreme Court order granting reconsideration and granting leave to appeal dated November 1, 1993 ..... 68a

Michigan Supreme Court order denying leave to appeal dated May 14, 1993 ..... 71a

Michigan Court of Appeals unpublished opinion dated November 23, 1992 ..... 73a

Michigan Supreme Court order vacating in part and remanding to the Court of Appeals dated May 8, 1992 ..... 87a

Michigan Court of Appeals unpublished opinion dated September 9, 1991 ..... 89a

OPINION

Michigan Supreme Court
Lansing, Michigan

FILED AUGUST 26, 1994

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v No. 95406

JAMES KING ANDERSON, III,

Defendant-Appellant.

_____/

BEFORE THE ENTIRE BENCH

AFTER REMAND

RILEY, J.

In this case, we are called upon first to determine whether admission of a postarraignment statement by the defendant violated his Sixth Amendment right to counsel and, second, if it was a violation, whether the admission of this statement and the admission of certain hearsay statements in violation of MRE 803(4) can be deemed harmless errors. With regard to the postarraignment statement, we find that it

was admitted in violation of defendant's Sixth Amendment right to counsel. Moreover, we are not persuaded that this error was harmless and therefore reverse the opinion of the Court of Appeals and remand to the trial court for proceedings consistent with this opinion. In light of this holding, however, we do not find it necessary to independently review whether the hearsay admissions were also harmful.

I. FACTS AND PROCEDURAL HISTORY

Defendant was charged with first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), for allegedly engaging in certain sexual acts with his nine-year-old daughter. On February 10, 1989, a Kalkaska County jury found defendant guilty as charged, and he was sentenced to fifty to seventy-five years

in prison.

The crucial testimony at trial came from the complainant, Detective Bruce Gaultier, social worker Barbara Cross,[1] and defendant.[2] Complainant testified first and stated that the sexual abuse occurred when she visited defendant,[3] her natural father, at Sue Rebone's home during Christmas vacation. Although she testified regarding several occasions of sexual abuse, complainant only specifically discussed the sexual acts of one night.[4]

The alleged sexual conduct occurred at the end of the evening, after complainant retired to sleep in one bedroom, Ms. Rebone to another, with defendant remaining on the living-room couch. During the night, defendant allegedly entered complainant's bedroom

wearing just his underwear. Complainant indicated that he then pulled down his underwear, pulled down her underwear, and raised her nightgown. She then testified to two specific sexual acts during which defendant inserted his finger into her vagina[5] and anus.[6] Each time complainant told defendant to stop because she knew it would hurt.[7] Aside from these two specific sexual references, complainant alluded to defendant inserting his penis in her, but did not explain where he inserted his penis or when this occurred.[8] However, she was certain that it did not occur on the same night as the above two sexual acts.

Both Detective Gaultier and Ms. Cross corroborated these two acts and testified about other, additional sexual

acts spanning, in some cases, years. Detective Gaultier testified first. However, before testifying, the trial judge conducted a midtrial evidentiary hearing to determine the admissibility of certain statements[9] made to Detective Gaultier. The statement crucial to this appeal is defendant's admission that he had sexual thoughts about his daughter, but would immediately clear them from his mind. This statement occurred in a police car when defendant was returning from taking a polygraph examination in another city. At the evidentiary hearing, Detective Gaultier testified that defendant received and waived his Miranda[10] rights one hour earlier at the polygraph examination. Also, before obtaining this statement in the patrol car, Detective Gaultier "asked

[defendant] if he was familiar with his Miranda rights that he had previously waived earlier that day?" On the basis of defendant's Miranda waiver, the judge admitted the statement.[11]

After the jury returned, Detective Gaultier related this statement to the jury. On cross-examination, however, defense counsel presumably attempted to mitigate the prejudice of the statement by eliciting from Detective Gaultier defendant's denial of each of the following allegations: (1) attempting to insert his penis into complainant's vagina, (2) inserting his tongue into her vagina, and (3) putting his penis in her mouth.[12] On redirect examination, the prosecutor, without objection by defense counsel, essentially elicited a detailed recount of every allegation

recorded by Detective Gaultier from his conversations with complainant.[13]

The prosecutor them emphasized this testimony in closing argument:

> Mr. Gaultier . . . was able to list and reiterate from a conversation with [complainant] . . . every single [thing] that you found out today. It's interesting, ladies and gentlemen. Detective Gaultier testified to you that when he was speaking with the defendant, the defendant admits to him he has sexual thoughts about his nine-year-old daughter. That's a very specific descriptive term, sexual thoughts. [(Emphasis added.)]

Following Detective Gaultier's testimony, Ms. Cross confirmed some of the allegations when testifying as an expert in psychiatric social work about the following:[14]

> During that session specifically what she told me was that he tried to stick it in her, is the way she put it. That he put his pinkey [sic] in her, and she was referring to her vaginal area.

* * *

> She told me that her dad had put his penis in her mouth; that he had put vaseline all over her vagina; all over her butt; that he asked her to do the same thing to him and that she had; and she was real upset telling me that, because she felt so guilty and so bad; she told me that he had put his mouth on her vagina; that he had tried to stick it in her; that he had touched her breasts; and that he had told her not to tell anyone or she'd be in trouble if she did.

After the prosecution presented its case, defendant testified and denied all these allegations. He even stated that he did not recall complainant's visit to Ms. Rebone's home on the date in question and suggested that complainant was lying.[15] Nevertheless, the jury convicted defendant as charged.

Defendant appealed in the Court of Appeals, raising several claims of error,[16] only two of which are pertinent to this Court's review: (1) defendant's

claim that it was error requiring reversal to permit Detective Gaultier, in violation of defendant's Sixth Amendment right to counsel, to testify about defendant's statement that he had sexual thoughts about his daughter, and (2) defendant's contention that it was error requiring reversal to allow Ms. Cross, pursuant to MRE 803(4)'s medical treatment hearsay exception, to recount complainant's statements describing the alleged sexual conduct. On September 9, 1991, the Court of Appeals affirmed in an unpublished opinion per curiam (Docket No. 120714), holding that there was no Sixth Amendment violation, but finding Ms. Cross' testimony hearsay but harmless.

In lieu of granting leave to appeal, this Court remanded the case[17] to the

Court of Appeals to consider defendant's statement to Detective Gaultier in light of People v Bladel (After Remand), 421 Mich 39; 365 NW2d 56 (1984), and to determine whether that statement and the hearsay testimony of Ms. Cross were harmless errors.

On remand, in a split decision, the Court of Appeals affirmed the conviction, presuming[18] a Sixth Amendment violation, but deeming this error, as well as the hearsay testimony, harmless. Judge Cavanagh dissented, reasoning that the errors were not harmless.

Defendant again sought leave to appeal in this Court, which was denied on May 14, 1993.[19] On motion for reconsideration, however, this Court granted leave to appeal.[20] After granting an opportunity for full briefing and

argument, this Court, while retaining jurisdiction, ordered a remand to the trial court for an evidentiary hearing regarding defendant's Sixth Amendment right to counsel claim in light of Bladel, supra, aff'd sub nom Michigan v Jackson, 475 US 625; 106 S Ct 1404; 89 L Ed 2d 631 (1986), and Patterson v Illinois, 487 US 285; 108 S Ct 2389; 101 L Ed 2d 261 (1988).[21] Specifically, we ordered the court to determine whether defendant initiated further communications with the police by requesting a polygraph examination, and, if so, whether defendant waived his right to counsel at both the polygraph examination and in the patrol car.

On remand, three witnesses testified, the most pertinent of whom was Detective Gaultier. He clarified

the factual development regarding his initial contact with defendant, defendant's arrest and arraignment, and the arrangements for the polygraph examination. Detective Gaultier testified that before attending the polygraph examination, defendant had been arraigned and requested counsel.[22] Apparently, defendant requested a polygraph examination during an initial interview with Detective Gaultier, before his arrest and arraignment, at which time Detective Gaultier indicated that he would make the arrangements and provide transportation if needed. After being arraigned, appointed counsel, and released on bond, Detective Gaultier contacted defendant regarding the polygraph examination by leaving a message at defendant's residence. Upon receiv-

ing the message, defendant contacted Detective Gaultier and accepted his offer to provide transportation. At the examination, the polygraph examiner obtained defendant's waiver of his Miranda rights by way of a standard waiver form. Moreover, Detective Gaultier reaffirmed defendant's waiver of his Miranda warnings before obtaining the contested statement by asking him whether he remembered his rights being read to him earlier in the day.

On the basis of this information, the trial judge opined that defendant initiated the request for the polygraph examination and properly waived his right to counsel, both at the examination and in the patrol car. Because this Court retained jurisdiction in this matter, the case is again before this

Court.

II. SIXTH AMENDMENT RIGHT TO COUNSEL

We turn first to defendant's claim that the trial court erroneously admitted a statement in violation of his Sixth Amendment right to counsel. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." The right to counsel attaches and represents a critical stage "only at or after the initiation of adversary judicial proceedings against the accused by way of a formal charge, preliminary hearing, indictment, information, or arraignment." Bladel, supra at 52. However, the right is invoked only by requesting counsel, usually at postcharge questioning or at arraignment. See Patterson,

supra at 290-291.[23] Therefore, after formal adversarial proceedings have begun and the defendant asserts the right to counsel either at questioning or arraignment, "the police may not conduct further interrogations until counsel has been made available to the accused, unless the accused initiates further communications, exchanges, or conversations with the police." Bladel, supra at 66. This rule, as set forth in Bladel and affirmed by the United States Supreme Court in Jackson, supra, is intended to be a bright-line rule, with the only exception being a subsequent initiation by defendant. Jackson, supra at 634.

In the instant case, defendant was arraigned and invoked his right to counsel by requesting counsel at his

arraignment.[24] In terms of falling within the exception set forth in Jackson, we agree that the factual findings below indicate that defendant technically "initiated" or asked to take a polygraph examination, but we are not persuaded that this initiation satisfies the requirements enunciated in Jackson. Indeed, defendant requested the examination before he was arrested or arraigned and, accordingly, before the bright-line rule in Jackson was triggered. Therefore, because defendant's Sixth Amendment right to counsel had not yet attached or been invoked, defendant's request for the polygraph examination could not fall with the Jackson exception.[25] Indeed, after being arraigned and requesting appointed counsel, the general prohibition against further

police interrogation was invoked,[26] absent any subsequent initiation and waiver by defendant.[27]

Applying the bright-line rule in Jackson to the case at bar, it is clear that defendant did not initiate any further communication postarraignment. Instead, Detective Gaultier initiated contact with defendant by leaving the message at defendant's residence, unquestionably in anticipation of further police interrogation, i.e., the polygraph examination and questioning thereafter. Indeed, simply because defendant responded to this message with a desire to endure further questioning does not remedy this problem. Id. at 635, n 9. Thus, with the slate set clean by Jackson, we are persuaded that defendant did not initiate further com-

munications and accordingly, the subsequent interrogation and admission by defendant in the patrol car violated defendant's Sixth Amendment right to counsel and should have been excluded.[28] We now turn to our harmless error analysis.

III. HARMLESS ERROR

An error that violates the federal constitution obliges us to look to federal precedent for the harmless error rule. Chapman v California, 386 US 18, 24; 87 S Ct 824; 17 L Ed 2d 705 (1967), and Arizona v Fulminante, 499 US 279; 111 S Ct 1246; 113 L Ed 2d 302 (1991).[29] The United States Supreme Court has set forth a two-part inquiry. First, a court must ask if the error is a "structural defect[] in the constitution of the trial mechanism, which def[ies]

analysis by 'harmless-error' standards." Fulminante, supra at 309. These errors include the total deprivation of the right to trial counsel,[30] an impartial judge,[31] excluding grand jury members who are the same race as defendant,[32] denial of the right to self-representation,[33] denial of the right to a public trial,[34] and a constitutionally improper reasonable doubt instruction.[35] Upon finding any of these errors, a court must automatically reverse.

At the other end of the spectrum, however, are trial errors that "occur[] during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt."

Fulminante, supra at 307-308. This requires the beneficiary of the error to prove,[36] and the court to determine, beyond a reasonable doubt that there is no "'reasonable possibility that the evidence complained of might have contributed to the conviction.'" Chapman, supra at 23.

While the instant error does not justify automatic reversal as a structural error that infects the entire trial mechanism, it is a trial error occurring during the presentation of the case to the jury and thereby subject to a harmless error analysis. Accordingly, applying the federal harmless error test, we do not find this error harmless beyond a reasonable doubt.

We reach this conclusion after examining the entire record and considering

both the statement itself and its subsequent emphasis in closing argument. There is no doubt that a father in admitting that he is having sexual fantasies about his daughter is making an inculpatory and highly prejudicial admission. Realizing the probative value of this admission, the prosecutor capitalized on the admission in closing argument:

> It's interesting, ladies and gentlemen. Detective Gaultier testified to you that when he was speaking with the defendant, the defendant admits to him he has sexual thoughts about his nine-year-old daughter. <u>That's a very specific descriptive term, sexual thoughts</u>. [(Emphasis added.)]

Considering the obvious prejudicial and inculpatory nature of this statement, the emphasis in closing argument, and the lack of other, admissible corroborating evidence in this

credibility contest,[37] we cannot conclude beyond a reasonable doubt that this inadmissible evidence did not tip the scale in favor of the prosecution and contribute to the jury's verdict. Instead, we find it reasonable to believe that this evidence affected the jury's decision to convict.

IV. CONCLUSION

Because we have concluded that the Sixth Amendment error independently requires reversal, we need not consider whether the admission of the hearsay statements[38] were also harmful.[39] Instead, we rely on the Sixth Amendment violation as the basis for reversing the opinion of the Court of Appeals and remanding the case to the trial court for proceedings consistent with this opinion.

---

[1]Complainant first came in contact with Ms. Cross after her mother and stepfather discovered that her two stepbrothers were sexually molesting her. During a counseling session with Ms. Cross, complainant stated that defendant also molested her. Ms. Cross immediately informed the authorities after which she continued counseling complainant with these later sessions producing the inadmissible hearsay testimony at issue in the instant case.

[2]The remaining witnesses did not testify regarding any acts of sexual abuse by defendant.

First, complainant's mother testified about the sexual abuse by complainant's stepbrothers, thereby explaining the need for counseling with Ms. Cross. She also explained why these initial allegations were not relayed to defendant, her natural father.

Second, Dr. Douglas Newman, the family physician, testified about complainant's frequent urinary and vaginal infections, as well as bed-wetting. Although Dr. Newman did not notice anything unusual with her hymen, he indicated that the insertion of a tongue, penis, or finger could leave the hymen intact. Similarly, the use of vaseline into the anus might cover any visible effects. Dr. Newman also indicated that the urinary infections could have been caused by vaginal irritation or masturbation. In fact, Dr. Newman stated that complainant's mother reported her fre-

quent masturbation. Nonetheless, he did not testify regarding any physical evidence of sexual abuse or actual knowledge of sexual abuse.

The remaining witness was defendant's character witness, Lisa Trobaugh, a friend of defendant. She testified that defendant had lived with her and her husband at their home for several years, where complainant often visited the defendant. Ms. Trobaugh stated, however, that complainant and defendant never slept in the same room together and that complainant never appeared upset on these visits.

Accordingly, the only testimony regarding the specific sexual acts came from complainant, Ms. Cross, and Detective Gaultier. Defendant denied every allegation.

[3]At the time of the alleged sexual conduct, complainant was living with her mother and stepfather. It was at this residence that complainant's stepbrothers sexually molested her.

[4]On this night, defendant, Ms. Rebone, and complainant viewed two children's videos and one adult video. During this time, defendant allegedly became intoxicated from drinking vodka.

[5]Complainant specifically stated that defendant inserted his pinkie into her vagina. Complainant then explained that she knew it was his pinkie because he had done this on previous occasions.

[6]Complainant described this later event in detail by stating that defen-

dant instructed her to roll over upon which defendant rubbed vaseline all over her buttocks. Defendant then inserted his finger, although she did not specify which finger as she had done in regard to her vagina.

[7]Defendant eventually fell asleep and then "wet" the bed. Complainant explained that defendant often wets the bed when he has been drinking. In fact, she indicated that he had wet her bed on other occasions.

[8]There were two points in the record where the prosecutor tried to elicit testimony from complainant regarding conduct involving defendant's penis:

> Q. Now do you remember your dad trying to do anything with his penis that night?
>
> A. No.
>
> * * *
>
> Q. Now you said your dad had done things to you before, is that true?
>
> A. Yes.
>
> Q. Things like he did this night?
>
> A. Yes.
>
> Q. Okay, has he ever tried to put his penis in you?
>
> A. Yes.
>
> Q. Do you remember when the last time was?

A. No.

[9]The judge considered the admission of three statements, the first two of which are not subject to this appeal.

[10]Miranda v Arizona, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[11]The judge also held that the statement could "be reasonably construed to be an admission against his interests under the exception of the hearsay rule, 804(B)(3)."

[12]Complainant did not previously testify about any of these allegations, but simply alluded to conduct involving defendant's penis. See n 8.

[13]This testimony consisted of the complainant (1) describing defendant's penis in the erect position and defendant forcing her to rub his penis, (2) defendant rubbing her vagina with his hand, (3) describing the taste of urine and semen as sour, (4) describing the pain she felt when defendant attempted to insert his penis in her vagina, and (5) describing similar events aside from the one night in January, including when the family lived in other states, and also the previous year when she was in second grade.

[14]Ms. Cross began to explain what specific sexual acts transpired when defense counsel objected to this testimony as hearsay. The trial judge overruled his objection and allowed her to testify on the basis of MRE 803(4)'s medical treatment exception to the hearsay rule.

[15]Defendant denied that he ever rents adult videos and, regardless, would never allow his daughter to view them.

[16]Defendant claimed that the trial court erred in finding complainant competent to testify, in admitting testimony of other instances of sexual relations between him and the complainant, and in instructing the jury. Defendant also alleged that certain prosecutorial misconduct denied him a fair trial. These claims of error were not pursued in this appeal, and we therefore express no opinion in regard to their merit.

[17]439 Mich 1000 (1992).

[18]The Court of Appeals stated:

> Upon examination of the record, we conclude that there is insufficient evidence to determine conclusively whether defendant waived his Sixth Amendment right to counsel prior to giving the statement at issue. Due to the inadequate development of the record, we presume that defendant did not waive his Sixth Amendment rights and therefore the statement at issue was taken in violation of those rights. Notwithstanding our presumption that the statement was taken in violation of defendant's Sixth Amendment right to counsel, we hold that the error was harmless beyond a reasonable doubt. [Unpublished opinion per curiam, issued November 23, 1992 (Docket No. 152135).]

[19]442 Mich 908 (1993).

[20]442 Mich 874 (1993).

[21]444 Mich 965 (1994).

[22]At the midtrial evidentiary hearing, Detective Gaultier testified that he was unaware whether counsel was appointed. On remand, however, Detective Gaultier seemed to indicate that he was aware that counsel was appointed.

[23]In Patterson, the defendant did not request counsel and therefore did not invoke the right to counsel even though he was indicted. The Court held that indictment does not trigger the invocation of the right to counsel and therefore does not trigger the ban against further police questioning. Id. at 291.

[24]Although we do not have a transcript of the arraignment, the record contains a form signed by defendant specifically requesting the appointment of counsel. Accordingly, there is no question that defendant invoked his right to counsel. Cf. Montoya v Collins, 955 F2d 279, 282-283 (CA 5, 1992).

[25]Accordingly, any communications made before the Sixth Amendment right to counsel had attached and been invoked--whether initiated by defendant or not--are irrelevant for purposes of the Jackson exception regarding whether he initiated further communications with respect to the Sixth Amendment right to counsel inquiry.

[26]While the record appears to be unclear whether Detective Gaultier knew of defendant's appointed counsel, Jackson makes clear that "[o]ne set of state actors (the police) may not claim ignorance of defendants' unequivocal request for counsel to another state actor (the court)." Id. at 634.

[27]See, e.g., Smith v Illinois, 469 US 91; 105 S Ct 490; 83 L Ed 2d 488 (1984).

[28]In light of our finding that there is a violation of Jackson, it becomes unnecessary for us to determine whether defendant waived his right to counsel. As stated earlier, this is a two-step inquiry: (1) did defendant initiate further communication, and, if so, (2) did he waive his Sixth Amendment right to counsel. Failing the former, the Court need not consider the latter.

29

> The application of a state harmless-error rule is, of course, a state question where it involves only errors of state procedure or state law. But the error from which these petitioners suffered was a denial of rights guaranteed [by the federal constitution] . . . . Whether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied. With faithfulness

> to the constitutional union of the States, we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights. We have no hesitation in saying that the right of these petitioners not to be punished for exercising their Fifth and Fourteenth Amendment right to be silent--expressly created by the Federal Constitution itself--is a federal right which, in the absence of appropriate congressional action, it is our responsibility to protect by fashioning the necessary rule. [Chapman, supra at 21.]

The Court actually formulated part of the harmless error test in Fahy v Connecticut, 375 US 85, 86-87; 84 S Ct 229; 111 L Ed 2d 171 (1963); however, it was never clear whether this was a federal harmless error rule or state harmless error rule. Chapman later confirmed that this is the federal harmless error rule and further defined the burden of persuasion needed to show the causal effect on the jury.

[30]Gideon v Wainwright, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963).

[31]Tumey v Ohio, 273 US 510; 47 S Ct 437; 71 L Ed 749 (1927).

[32]Vasquez v Hillery, 474 US 254; 106 S Ct 617; 88 L Ed 2d 598 (1986).

[33]McKaskle v Wiggins, 465 US 168; 177-178, n 8; 104 S Ct 944; 79 L Ed 2d 122 (1984).

[34]Waller v Georgia, 467 US 39, 49, n 9; 104 S Ct 2210; 81 L Ed 2d 31 (1984).

[35]Sullivan v Louisiana, 508 US ___; 113 S Ct 2078; 124 L Ed 2d 182 (1993).

[36]The Chapman Court explained the burden of proof in the following manner:

> Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless. It is for that reason that the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment. There is little, if any, difference between our statement in Fahy [n 32 supra], about "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction" and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. [Id. at 24.]

[37]While credibility contests are not uncommon in criminal sexual conduct cases, People v LaLone, 432 Mich 103, 117; 437 NW2d 611 (1989) (Brickley, J.); People v Straight, 430 Mich 418, 427; 424 NW2d 257 (1988), the wrongful admission of corroborating testimony "on either side could tip the scales" and

result in harmful error. People v Gee, 406 Mich 279, 283; 278 NW2d 304 (1979).

[38]We note that defendant also attempted to frame this error as a constitutional error in violation of the federal Sixth Amendment Confrontation Clause. However, we find difficulty in concluding that defendant's confrontation rights were violated because the declarant testified and was available for cross-examination. See Idaho v Wright, 497 US 805; 110 S Ct 3139; 111 L Ed 2d 638 (1990); People v Poole, 444 Mich 151, 162-163; 506 NW2d 505 (1993). Regardless, however, we do agree that the testimony clearly violated our interpretation of MRE 803(4) in LaLone, supra, and must be avoided at retrial.

[39]Accordingly, we save for another day, after full briefing and argument, the distinction between, and the enunciation of, the constitutional harmless error test and Michigan's nonconstitutional harmless error test.

STATE OF MICHIGAN
46TH JUDICIAL CIRCUIT COURT,
KALKASKA COUNTY

THE PEOPLE OF THE STATE OF MICHIGAN Appellee	)	
v	)	SC: 95406
	)	COA: 152135
JAMES KING ANDERSON III	)	LC: 88-905-FC
Defendant/Appellant	)	

MARK S. MACKLEY (P38847)
Prosecutor

JEANICE DAGHER-MARGOSIAN (P35933)
Attorney for Defendant/Appellant

OPINION

At a session of said Court,
held in the Village of Kalkaska,
Michigan, on the 17th day of May, 1994.

Following an evidentiary hearing held in this Court and cause on May 12, 1994, pursuant to order of the Michigan Supreme Court entered March 25, 1994, the Court makes the following findings of fact:

Commencing May 19, 1988, Detective Sergeant Bruce Gualtiere of the Kalkaska County Sheriff's Department began an investigation of James King Anderson as a result of a complaint of criminal sexual conduct lodged by the Department of Social Services.

By May 23, 1988, Gualtiere had obtained a warrant for Anderson's arrest. On May 23, 1988, Gualtiere interviewed Anderson at the Sheriff's Department commencing at 9:45 a.m. Gualtiere did not Mirandize Anderson prior to the interview nor did he tell him that he had a warrant for his arrest. Anderson was not served with the arrest warrant until after the interview was concluded. Early on in the interview, Anderson requested a polygraph interview and Gualtiere agreed

to arrange one. Anderson's request took Gualtiere by surprise and effectively ended the interview. When the interview ended, Anderson was arrested. On May 24, 1988, Anderson posted bond according to the District Court file.

Gualtiere requested a polygraph exam from the State Police in Gaylord, Michigan, on May 23rd or 24th but had to wait for a confirmation of a date and time. On May 25th, Gualtiere was given a June 2, 1988 date for the exam. That same day Gualtiere left an oral or written message of the exam date with someone other than Anderson at Anderson's residence, along with instructions to notify Gualtiere if Anderson required transportation to the exam site. Sometime prior to June 2nd, Anderson notified Gualtiere that he would avail

himself of the offer for transportation.

On May 26, 1988, Anderson was arraigned on the complaint in District Court and Attorney Robert Carey, of Kalkaska, was appointed to represent him. Carey had no direct contact with his client until June 6, 1988. At that initial meeting, Carey recognized he had a conflict of interest with a pending probate action. He informed Anderson of his inability to represent him and proceeded to withdraw as counsel. At an earlier pre-pretrial meeting between Carey and the prosecuting attorney on June 2, 1988, at which Anderson was not present, there was no discussion of the polygraph then in progress. There is no indication that either lawyer knew about the polygraph.

On June 2, 1988, Anderson met

Gualtiere at the Sheriff's Department and was transported to Gaylord for a polygraph exam conducted by Michigan State Police polygraph examiner Michael McMasters. The exam was scheduled for 1:00 p.m., and the parties arrived at approximately 12:45 p.m.

The exam was conducted in a commercial building (not the State Police Post) in a suite of offices rented for polygraph purposes. Anderson was brought to the examination room at 2:08 p.m., and McMasters proceeded to take a brief personal history. At 2:10 p.m., McMasters gave Anderson the Miranda rights, warning, waiver and acknowledgement embodied in Plaintiff's Exhibit 1 attached. McMasters read the rights to Anderson while Anderson followed along from a duplicate sheet. Anderson filled

in the blanks in the waiver section and signed the form. The advice of rights recited apparently took six minutes. During this process, Anderson told McMasters that he did have an attorney named "Karrie" (sic). McMasters explained Anderson's right to not proceed without counsel or to stop at any time to contact and consult with counsel. No other or special rights were given. McMasters did not specifically articulate for Anderson the potential perils of proceeding without counsel. The examination proper commenced at 3:19 p.m. and concluded at 3:42 p.m. During the course of the examination, Anderson made no request to stop the process or to consult with counsel.

Gualtiere spent some time following

the polygraph talking with McMasters out of Anderson's presence.

When Gualtiere and Anderson got in the car for the return trip and while still in the parking lot, Gualtiere told Anderson he wanted to talk further with him about the case and his polygraph test results. Gualtiere asked Anderson if he recalled the Miranda rights previously given to him by McMasters and told Anderson they were still in effect. Anderson responded that he recalled the rights and understood they remained in effect and agreed to talk to Gualtiere. Within the first fifteen minutes of the return trip and approximately one hour from the conclusion of the polygraph examination, Anderson made the statement under scrutiny by the Court.

In response to the Supreme Court's

specific question, this Court finds that Anderson did initiate the request for a polygraph examination, pre-arrest and pre-arraignment but post-custody under the circumstances previously set forth.

Post-arrest and post-arraignment, Anderson reinitiated or elected to proceed with the polygraph process by doing everything necessary to accomplish the exam. Anderson was out of jail on May 24th. He was in court and given a lawyer on May 26th. He had no contact with Gualtiere other than indirect communication regarding transportation between May 24th and June 2nd, a space of nine days. If Anderson did not wish to proceed, all he had to do was not appear. To the contrary, he was assiduous (sic) about following through on arrangements for transportation and being at the

appointed place at the appointed time to accomplish the polygraph exam.

There is no evidence that Anderson made any attempt to contact his lawyer after one was made available to him on May 26th prior to the June 6th meeting which was scheduled by the lawyer.

Unlike any of the defendants in People v Bladel, 421 Mich 29 (1984); Michigan v Jackson, 475 US 625 (1986) or Patterson v Illinois, 487 US 285 (1988), Anderson was at liberty at all times after a lawyer was made available to him. He had many days within which to elect to follow a course different than the one he pursued. Anderson had ample opportunity to consult with counsel and apparently chose not to do it.[1]

The Bladel Court stated at page 65: "We decline to follow the reasoning of

those cases which have found valid Sixth Amendment waivers after a request for counsel has been made to a magistrate based solely on waivers of Miranda rights." In this case, the Defendant had the benefit of more than a bare recitation of Miranda warnings as reflected by Plaintiff's Exhibit 1. Of more importance is the subsequent analysis of the same issue by the United States Supreme Court in Patterson, supra, 487 US 294-298; 108 S Ct 2395-2397:

> "... The Miranda warnings also served to make petitioner aware of the consequences of a decision by him to waive his Sixth Amendment rights during post-indictment questioning. Petitioner knew that any statement that he made could be used against him in subsequent criminal proceedings. This is the ultimate adverse consequence petitioner could have suffered by virtue of his choice to make uncounseled admissions to the authorities. This warning also sufficed -- contrary to petitioner's claim here ... to let petitioner know what a lawyer could "do for him" during the post-indictment questioning: namely,

advise petitioner to refrain from making any such statements. By knowing what could be done with any statements he might make, and therefore, what benefit could be obtained by having the aid of counsel while making such statements, petitioner was essentially informed of the possible consequences of going without counsel during questioning.

...

"Our conclusion is supported by petitioner's inability, in the proceedings before this Court, to articulate with precision what additional information should have been provided to him before he would have been competent to waive his right to counsel.... Under close questioning on this same point at argument, petitioner likewise failed to suggest any meaningful additional information that he should have been, but was not, provided in advance of his decision to waive his right to counsel. The discussions found in favorable court decisions on which petitioner relies are similarly lacking.

"As a general matter, then, an accused who is admonished with the warnings prescribed by this Court in Miranda, 384 US at 479; 86 S Ct at 1630, has been sufficiently apprised of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights, so that his waiver on this basis will be considered a knowing and intelligent one.

We feel that our conclusion in a recent Fifth Amendment case is equally opposite here: "Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law." See Moran v Burbine, 475 US, at 422-423; 106 S Ct at 1142.

"We consequently reject petitioner's argument, which has some acceptance from courts and commentators that since "the Sixth Amendment right [to counsel] is far superior to that of the Fifth Amendment right," and since "[t]he greater the right the greater the loss from a waiver of that right," waiver of an accused's Sixth Amendment right to counsel should be "more difficult" to effectuate than waiver of a suspect's Fifth Amendment rights.... While our cases have recognized a "difference" between the Fifth Amendment and Sixth Amendment rights to counsel, and the "policies" behind those constitutional guarantees, we have never suggested that one right is "superior" or "greater" than the other, nor is there any support in our cases for the notion that because a Sixth Amendment right may be involved, it is more difficult to waive than the Fifth Amendment counterpart." 108 S Ct 2389, 2395-2397.

Bladel stops short of requiring that the defendant actually consult with counsel or that counsel be present before the defendant can initiate contact with the police for purposes of making a statement. Bladel, supra, 65-66.

Here counsel was made available to Anderson by the Court. Anderson was on bond and had nine days to contact and consult with counsel if he had chosen to do so. Anderson reinitiated communications with the police while out of the presence of law enforcement personnel and free to avoid them. Anderson knew he had a lawyer and announced that fact and provided his lawyer's name to Trooper McMasters. Anderson then, freely, voluntarily, knowingly and intelligently waived his right to have

his lawyer present or contact his lawyer in any fashion prior to giving a statement.

This is the unrefuted testimony of Trooper McMasters:

"A This Rights form is used to advise what's known as the Miranda Warning; to tell the person that they have a right to remain silent, that they don't have to say anything, that anything they do say will be used against them in Court. He has a right to have an attorney and if he can't afford an attorney, one will be appointed for him. And then, he has to -- we have to be certain that he understood those rights. And, if he understands them, is he willing to waive those rights and talk to me about the case.

Q All right. Can you tell me specifically, Mr. McMasters, how that form is used? Is it read to him, or...

A It is read to him.

Q All right. Does he -- is he afforded the opportunity to read along with you?

"A Yes. He has a copy in his hand while I read this particular form to him.

Q All right. Now, you read the form to him?

A Yes, I did.

Q Okay. And were you satisfied that he understood what you read to him?

A Yes, I was.

Q All right. And he informed you, did he not, that he had been appointed an attorney?

A Yes, he did.

Q And did he give you a name?

A Yes, he did.

Q And what name did he give you?

A Attorney Carey.

Q All right. What did you do after learning that he had an attorney?

A When he advised me that he had an attorney by the name of Mr. Carey, I told him that just because Mr. Carey wasn't present in the building with us, that didn't mean that he didn't have the right to talk to Mr. Carey. And, if at any time he decided that he needed to, or wanted to consult with Mr. Carey, we would stop and we would go to a phone and we would call Mr. Carey and he could counsel with Mr. Carey

over the telephone. And, if we couldn't get a hold of Mr. Carey, we would stop the proceeding until he did get a hold of him and did have the opportunity to talk to Mr. Carey."

(Evidentiary Hrg. Transcript, page 9, line 2 through page 10, line 18)

...

"Q All right, And in -- during the course of your examin--your initial discussion with Mr. Anderson, did he at any time stop you and request to consult with Mis--with Mr. Carey or any other attorney?

A No.

Q All right. And during the course of the polygraph, which began at approximately 3:19, and ended at 3:42; did Mr. Anderson stop you, at all, and request to consult with Mr. Carey or any other attorney.

A No.

MR. MACKLEY: That's all I have of this witness, Judge.

"THE COURT: All right. Ms. Margosian.

CROSS-EXAMINATION

BY MS. DAGHER-MARGOSIAN:

Q Mr. McMasters, you've said that when the Defendant advised you that he had a lawyer, you then told him, "We can call your lawyer and you can talk to your lawyer before we continue." Is that correct?

A Yes; that he could stop and -- the proceedings until he consulted with his attorney, whether it was by phone or whether he got a hold of him personally, or however we made the arrangements.

Q Okay. That was the extent of the rest of your discussion concerning his attorney. Is that correct?

A Yes.

Q Okay."

(Evidentiary Hrg. Transcript, page 14, line 6 through page 15, line 7)

This court concludes that Anderson waived his Fifth and Sixth Amendment rights prior to making any statements for polygraph purposes.

The Court further concludes that Anderson, voluntarily, knowingly and

intelligently waived his Fifth and Sixth Amendment rights immediately prior to making the statement complained of in the patrol car to Det. Sgt. Gualtiere. In support of this conclusion, the record reflects that Anderson was given the Miranda warnings commencing at 2:10 p.m. and ending at 2:16 p.m. The polygraph exam concluded at 3:42 p.m. Following the polygraph, McMasters and Gualtiere spent some time talking, which the Court estimates at fifteen to thirty minutes. Following that communication, Anderson and Gualtiere got in the car to begin the return trip and Gualtiere reminded Anderson of his rights. Within fifteen minutes of that exchange, Anderson made his statement. The total elapsed time from the full recitation of Miranda rights was approximately two

hours and fifteen minutes. It strains credulity, especially given the intervening reminder by Gualtiere, that Anderson would forget his rights within that time span. Further, Anderson had no reason to be anything less than on guard with Gualtiere, who, after all, had arrested him for this felony eleven days earlier.

The Clerk is directed to return this file to the Michigan Supreme Court for further proceedings.

/s/
ALTON T. DAVIS, Circuit Judge
May 17, 1994

---

[1]While not of record, the Court notes that according to the 1993-1994 Michigan Manual, the 1990 population of Kalkaska County was 13,497. The population of the Village of Kalkaska was 1,952. The 1992 Attorney Listing for the 46th Judicial Circuit published by Northwest Reporting lists five attorneys in Kalkaska County, including the prosecuting attorney.

PLAINTIFF'S EXHIBIT 1

NAME OF EXAMINEE James King Anderson III

RIGHTS

1. You have the right to refuse this examination.
2. You cannot be discharged from employment solely because you so refuse this examination.
3. You cannot be denied employment solely because you refuse this examination.
4. You have the right to halt this examination at any time.
5. You are not required to answer any questions or give any information.
6. Any information you volunteer will be used against you, or made available to the party requesting this examination, unless otherwise specified and agreed to in writing.

MIRANDA WARNING

1. You have the right to remain perfectly silent.
2. Anything you say will be used against you in court.
3. You have the right to talk to a lawyer and have him or her present with you before or during any questioning, or available to you at any time during this examination.
4. If you want a lawyer but cannot afford one, one will be appointed to represent you at public expense.
5. If you waive your right to remain silent and later wish to stop answering questions, the questions will stop.
6. If you waive your right to have a lawyer present and later change your mind, the questioning will stop until you have talked with a lawyer.

WAIVER

1. Do you understand each of these right that I have explained to you? Answer yes

2. Are you willing to give up these rights and answer my questions at this time? Ans. yes

ACKNOWLEDGEMENT

1. I am willing to take a polygraph examination consisting of a testing phase with questioning before and after.

2. I understand that I have the right to remain silent and that anything that I say before the test, during the test, or after the test can be used against me in a court of law. I further understand that I may exercise my right to remain silent and stop answering questions at any

time.

3. I understand that the polygraph examination cannot be conducted with a lawyer actually present in the examination room, and I am willing to waive his or her presence. However, I fully understand that I have the right to talk with and have the assistance of a lawyer at any time during the polygraph examination, and that I may stop the examination or questioning at any time and exercise my Miranda rights that have been explained to me.

4. No promises or threats have been made to me and no pressure of any kind has been used against me.

5. This statement has been read to me and I understand each of my rights and I am willing to waive these

rights and take this polygraph examination at this time.

SIGNED /s/James K. Anderson

DATE 6/7/88 TIME 2:16

WITNESS /s/ M McMasters

Michigan Supreme Court
ORDER Lansing, Michigan

Entered: March 25, 1994

8 January 1994

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee, SC: 95406
v COA: 152135
LC: 88-905-FC

JAMES KING ANDERSON, III,

Defendant-Appellant.
_____/

In defendant's first appeal to this Court, we remanded[1] to the Court of Appeals to consider defendant's statement to Detective Gaultier in light of People v Bladel (After Remand), 421 Mich 39; 365 NW2d 56 (1984), and to determine whether that statement and the hearsay testimony of Ms. Cross were harmless errors.

Upon remand, in a split decision, the Court of Appeals affirmed the con-

viction, presuming[2] a Sixth Amendment violation, but deeming this error, as well as the hearsay testimony, harmless.

Defendant again sought leave to appeal to this Court which was denied on May 14, 1993.[3] On motion for reconsideration, however, this Court granted leave.[4]

This case now having been argued and submitted, and this Court having reviewed the record, we REMAND to the Kalkaska Circuit Court and direct the court to conduct an evidentiary hearing regarding the status of defendant's Sixth Amendment right to counsel claim in light of People v Bladel (After Remand), 421 Mich 39; 365 NW2d 56 (1984), aff'd sub nom Michigan v Jackson, 475 US 625; 106 S Ct 1404; 89 L

Ed 2d 631 (1986), and Patterson v Illinois, 487 US 285; 108 S Ct 2389; 101 L Ed 2d 261 (1988). Specifically, we order the court to determine whether defendant initiated the request for the polygraph exam. If the court finds that defendant did not initiate the request, then this case should be returned to this Court for further proceedings. However, if defendant initiated the request, then the court is directed first to determine whether defendant waived his Sixth Amendment right to counsel at the polygraph exam and second, whether the waiver, if any, extends to the subsequent questioning of defendant in the police car.

The findings of the Kalkaska Circuit Court are to be filed with the Clerk of this Court within 60 days after the entry of this order.

We retain jurisdiction.

---

[1] 439 Mich 1000 (1992).

[2] The Court of Appeals stated:

> Upon examination of the record, we conclude that there is insufficient evidence to determine conclusively whether defendant waived his Sixth Amendment right to counsel prior to giving the statement at issue. Due to the inadequate development of the record, we presume that defendant did not waive his Sixth Amendment rights and therefore the statement at issue was taken in violation of those rights. Notwithstanding our presumption that the statement was taken in violation of defendant's Sixth Amendment right to counsel, we hold that the error was harmless beyond reasonable doubt. [Unpublished opinion per curiam, decided November 23, 1992 (Docket No. 152135).]

[3] 442 Mich 908.

[4] 444 Mich 874 (1993).

Levin, J. (dissenting). Under the circumstance that People v Bladel (After Remand), 421 Mich 39 (1984), aff sub nom Michigan v Jackson), 475 US 625 (1986), was decided five years before the defendant's trial, it is, I believe, incumbent on the majority to justify remand to the trial court "to conduct an evidentiary hearing regarding the status of defendant's Sixth Amendment right to counsel claim in light of" Bladel and Patterson v Illinois, 487 US 285 (1988).1

Many a litigant would like an opportunity, five years after a jury's verdict has been rendered, to go back and expand upon the record made at the time of trial. Ordering a remand for that purpose is unusual and requires, I believe, some explanation why this case

is different than all or most other cases.

The order states that if the trial court "finds that defendant did not initiate the request [for a polygraph examination], then this case should be returned to this Court for further proceedings." But is [sic] also states "[w]e retain jurisdiction." The order should make clear that the case returns to this Court for further proceedings without regard to whether the trial court finds that the defendant initiated the request or did not initiate the request.

Since the order asks "whether the waiver, if any, extends to the subsequent questioning of defendant in the police car," I take it that the remand order does not permit expansion of the

record regarding what occurred on the return trip from Gaylord. To that extent, I agree with the order.

In all events, the citation of Patterson, supra, is potentially misleading. In Patterson, the Court held that a suspect who has been read his Miranda[2] rights and then confesses to a crime can be said to have waived his Sixth Amendment right to counsel as well as his Fifth Amendment right to counsel. Thus, the same standard applies to determine whether an accused has waived his Fifth and Sixth Amendment rights to counsel. To the extent the majority wishes to make this limited point, the citation of Patterson[3] is not potentially misleading.[4]

Patterson says nothing about the issue in the instant case, namely,

whether a defendant has waived his Sixth Amendment right to counsel when he provides a statement after a polygraph operator informs him of his Miranda rights and after a different officer asks him in a different environment whether he is "familiar with" the warnings he had received earlier.

---

[1] Patterson was also decided before the defendant's trial.

[2] Miranda v Arizona, 384 US 436 (1966).

[3] Patterson is not, however, relevant in light of the following footnote:

> We note as a matter of some significance that petitioner had not retained, or accepted by appointment, a lawyer to represent him at the time he was questioned by authorities. Once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect. See Maine v Moulton, 474 US 159, 176 (1985). The State conceded as much at argument. See Tr. of Oral Arg. 28.

> Indeed, the analysis changes markedly once an accused even requests the assistance of counsel. See Michigan v Jackson, supra; Part II-A, infra. [Id. at 290, n 3.]

In the instant case, the defendant had an attorney at the time of the questioning. Thus, Patterson's holding regarding the standards for waiver of the Fifth and Sixth Amendment right to counsel may not apply.

[4] In Patterson, the defendant had been indicted for murder. After his indictment, he gave a statement to a police officer immediately after he had been given and had initialed a form containing Miranda warnings. Later that same day, the defendant gave another inculpatory statement to a prosecuting attorney. Before giving this second statement, the defendant reviewed the written waiver of rights he had signed earlier, and he again placed his initials next to the written statement of each of his rights. He also signed another waiver form before giving this second statement. The Supreme Court held that because the defendant gave his statement immediately after having been informed of his Miranda rights, he had waived his Sixth Amendment right to counsel concerning his statement.

Cavanagh, C.J., joins in the statement by Levin, J.

(SEAL)

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 25, 1994 /s/Corbin R. Davis
Clerk

Michigan Supreme Court
Lansing, Michigan

ORDER

Entered: November 1, 1993

95406(27)

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES KING ANDERSON, III,

Defendant-Appellant.
_____/

SC: 95406
COA: 152135
LC: 88-905-FC

On order of the Court, the motion for reconsideration of this Court's order of May 14, 1993, is considered, and it is GRANTED. On reconsideration, the application for leave to appeal is again considered, and it is GRANTED.

The defendant is directed to file with the Kalkaska Circuit Court an affidavit concerning his present financial status (see guidelines at 387 Mich xxxi). The Kalkaska Circuit Court must provide the prosecutor with a copy of the defen-

dant's affidavit. The prosecutor may challenge the defendant's assertion of indigency by filing an appropriate motion with the Kalkaska Circuit Court within 14 days after the prosecutor receives the copy of the affidavit. If such challenge is brought, the Kalkaska Circuit Court must conduct a hearing on the matter within 21 days after the prosecutor's motion is filed. The prosecutor, the defendant, and an attorney appointed by the Kalkaska Circuit Court to represent the defendant must appear at the hearing.

If the Kalkaska Circuit Court determines that the defendant is indigent, the Court must continue the appointment of counsel within 14 days after the hearing or, if the prosecutor has not challenged the defendant's assertion of indigency, within 28 days after the defendant files

his affidavit. The Kalkaska Circuit Court must promptly forward to the Clerk of this Court a copy of the appointment order and must promptly provide counsel with any portion of the record that counsel requires.

If the Kalkaska Circuit Court determines that the defendant is not indigent, the Kalkaska Circuit Court must promptly notify the Clerk of this Court.

Appellant's brief and appendix shall be filed no later than December 6, 1993 and appellee's brief, and appendix, if any, shall be filed no later than December 27, 1993.

(SEAL)

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 1, 1993 /s/Corbin R. Davis
Clerk

ORDER

Michigan Supreme Court
Lansing, Michigan

Entered: May 14, 1993

95406

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES KING ANDERSON, III,

Defendant-Appellant.

SC: 95406
COA: 152135
LC: 88-905-FC

/

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Brickley, J., would grant leave to appeal.

Levin, J., states as follows:

I would grant leave to appeal to consider the harmless error issue. The Court of Appeals, on remand from this Court, found that the record was insuf-

ficient to "determine conclusively whether defendant waived his Sixth Amendment right to counsel prior to giving the statement at issue," and "presume[d] that defendant did not waive his Sixth Amendment rights and therefore the statement at issue was taken in violation of those rights." The hearsay statement of another witness had been found to be inadmissible on the earlier submission to the Court of Appeals. I am inclined to agree with the judge of the Court of Appeals who dissented that the errors may have prevented the defendant from receiving a fair trial.

Cavanagh, C.J., concurs in the dissenting statement of Levin, J.

(SEAL)

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 14, 1993 /s/ Jacqueline B. MacKinnon
Deputy Clerk

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES KING ANDERSON, III,

Defendant-Appellant.

---/

November 23, 1992

No. 152135
ON REMAND

Before: Doctoroff, C.J., and Brennan and Cavanagh, JJ.

PER CURIAM.

This case is before us on remand from our Supreme Court. Initially, we affirmed defendant's conviction for first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)a), and subsequent sentence of 50 to 75 years in an unpublished per curiam opinion. See People v Anderson, unpublished opinion per curiam of the Court of Appeals, decided September 9, 1991

(Docket No. 120714). Once again, we affirm.

Defendant's conviction arises out of allegations that he sexually assaulted his young daughter. During the course of the three-day jury trial, a witness named Barbara Cross testified. Cross was qualified as an expert in the area of psychiatric social work, and gave defendant's daughter support immediately following the episodes. On appeal, we concluded that her testimony was inadmissible hearsay within our Supreme Court's holding in People v LaLone, 432 Mich 103; 437 NW2d 611 (1989). In addition, an officer of the Kalkaska Sheriff's office testified regarding a statement defendant made in the police car after he had taken a polygraph examination. Defendant argued that this

statement was taken in violation of his Fifth Amendment rights. We concluded that the statement was not taken in violation of Miranda[1] or any other Fifth Amendment protections. See Anderson, supra at 3. We failed to consider whether the statement was taken in violation of his Sixth Amendment right to counsel.

After we affirmed defendant's conviction, he sought relief in our Supreme Court. In lieu of granting defendant's application for leave to appeal, the Court vacated that portion of our opinion addressing the admissibility of defendant's statement and remanded the matter to this court for reconsideration in light of People v Bladel (After Remand), 421 Mich 39; 365 NW2d 56 (1984), aff'd sub nom Michigan v

Jackson, 475 US 625; 106 S Ct 1404; 89 L Ed 2d 631 (1986). The Court further directed us to reevaluate the impact of the testimony of Barbara Cross, presumably under the assumption that defendant's statement was taken in violation of his Sixth Amendment right to counsel. We conclude that even if defendant's statement was taken in violation of his Sixth Amendment right to counsel, the evidence at trial was so overwhelming as to render any error harmless beyond a reasonable doubt. Accordingly, we affirm defendant's conviction.

In Bladel, supra, our Supreme Court stated as follows:

> The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence [sic]." However, this right to counsel attaches only at or after the initiation of adversary judicial proceed-

> ings against the accused by way of a formal charge, preliminary hearing, indictment, information, or arraignment. The accused is entitled to counsel not only at trial, but at all "critical stages" of the prosecution, i.e., those stages "where counsel's absence might derogate from the accused's right to a fair trial." Regardless of whether the accused is in custody or subjected to formal interrogation, the Sixth Amendment right to counsel exists whenever the police attempt to elicit incriminating statements. This right to counsel does not depend upon a request by the accused and courts indulge in every reasonable presumption against waiver. [Bladel, supra at 51-52. Citations omitted.]

In the instant case, defendant's Sixth Amendment right to counsel attached when he was arraigned on May 26, 1988, and defendant requested counsel at that time. Thus the only remaining questions are whether the period where defendant made the statement at issue could be considered a critical stage and, if so, whether defendant made a valid waiver of his Sixth Amendment right to counsel.

The circumstances under which defendant made the statement in issue convince us that the time period was a critical stage. A separate record was made where Detective Bruce Gaultier testified that on June 2, 1988, defendant took a polygraph examination in Gaylord. Defendant made the statement while on the return trip to Kalkaska where he was incarcerated. Gaultier admitted that he did not personally read defendant his Miranda rights in the car, although he believed that they were read in connection with the polygraph examination about one hour earlier. The prosecution did not call the state police officer who allegedly gave defendant his rights prior to the polygraph examination.

Gaultier testified that he and defendant were in the car on the way

back from the polygraph when he engaged defendant in a conversation regarding the offense with which defendant was charged. Detective Gaultier admitted that he was questioning defendant. Gaultier told defendant that he felt defendant was being untruthful, whereupon defendant admitted that he had sexual thoughts about his daughter, but as he became aware of them, he put them out of his mind. This statement was related to the jury during the prosecution's case-in-chief. Under the circumstances, we believe that the detective's questioning of defendant while he was transporting him from a polygraph examination was a critical stage in which defendant was entitled to counsel as guaranteed by the Sixth Amendment, or at least the opportunity to waive that right. See

Brewer v Williams, 430 US 387; 97 S Ct 1232; 51 L Ed 2d 424 (1977).

In Bladel, our Supreme Court directed courts to indulge every presumption against waiver of a defendant's Sixth Amendment right to counsel. Bladel, supra at 52. Upon examination of the record, we conclude that there is insufficient evidence to determine conclusively whether defendant waived his Sixth Amendment right to counsel prior to giving the statement at issue. Due to the inadequate development of the record, we presume that defendant did not waive his Sixth Amendment rights and therefore the statement at issue was taken in violation of those rights. Notwithstanding our presumption that the statement was taken in violation of defendant's Sixth Amendment right to

counsel, we hold that the error was harmless beyond reasonable doubt.

In evaluating error to determine whether it is harmless, a two-tiered analysis is applied. We must first determine whether the error is so offensive to the maintenance of a sound judicial system that it may never be considered harmless. People v Neal, 182 Mich App 368, 373; 451 NW2d 639 (1990) (quoting People v Furman, 158 Mich App 302, 317-318; 404 NW2d 246 [1987], lv den 429 Mich 851 [1987]). Next, we must determine whether the error was harmless beyond a reasonable doubt so that no reasonable juror would have acquitted the defendant in a trial without the error. Id.

In Neal, this Court determined that the trial court erred when it denied the

defendant's request that the court hold a hearing pursuant to People v Walker (On Rehearing), 374 Mich 331; 132 NW2d 87 (1965), to evaluate the voluntariness of certain statements made by the defendant. Nonetheless, this Court determined that the failure to hold the hearing was harmless because the introduction of the statement "did not constitute such an affront to the integrity of the trial process that reversal [was] required." Neal, supra at 373. In addition, the Court found that the evidence introduced was so overwhelming that all reasonable jurors would find guilt beyond a reasonable doubt even without the improperly admitted statements. Id. at 373-374. The Court therefore declined to remand for a Walker hearing.

In the case at bar, we conclude that the error was neither so severe as to be a threat to the maintenance of a sound judicial system, nor was it of the type that would influence a reasonable juror's decision to convict defendant of the offense charged. The victim in this case testified extensively and in graphic detail regarding the incidents of sexual misconduct that defendant committed. After conducting his investigation of the allegations, Detective Gaultier was able to corroborate the victim's testimony almost to the letter. We note that even without the testimony of Barbara Cross, whose statements we have previously found to be inadmissible, and the statement made to Detective Gaultier by defendant, any reasonable juror would have convicted

defendant on the crime charged. Accordingly, we conclude that neither a remand for expansion of the record, nor reversal is warranted in this case.

We do not take lightly the apparent violation of defendant's Sixth Amendment right to counsel. However, we simply cannot conclude that the error is a serious threat to the maintenance of a sound judicial system or to defendant's right to have a fair trial.

Affirmed. We do not retain jurisdiction.

s/Martin M. Doctoroff
s/Thomas J. Brennan

---

[1] Miranda v Arizona, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 644 (1966).

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff-Appellee,

v No. 152135

JAMES KING ANDERSON, III,

Defendant-Appellant.

---/

Before: Doctoroff, C.J., and Brennan and Cavanagh, JJ.

CAVANAGH, J. (dissenting).

I respectfully dissent. After a careful review of the record, I cannot agree with the majority's conclusion that the victim testified "extensively and in graphic detail" or that the evidence of guilt was so overwhelming any error would have been harmless.

I found the victim's testimony very limited and possibly influenced by the sexual abuse she had suffered at the

hands of her stepbrothers or by the fact that her father was contemplating a change in her custody. I am also troubled by Detective Gaultier's corroboration of the victim's allegations and cannot help but feel that all of the errors in this case prevented the defendant from receiving a fair trial.

I would reverse defendant's conviction.

/s/Mark J. Cavanagh

Michigan Supreme Court
ORDER Lansing, Michigan

Entered: May 8, 1992

92407

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee, SC: 92407
v COA: 120714
LC: 88-000905-FC
JAMES KING ANDERSON, III,

Defendant-Appellant.
_____/

On order of the Court, the application for leave to appeal is considered, and, pursuant to MCR 7.302(F)(1), in lieu of granting leave to appeal, we VACATE, in part, the judgment of the Court of Appeals and we REMAND the case to that court. On remand, the Court of Appeals shall reconsider the question of the admissibility of the defendant's post-arraignment statement in light of this Court's decision in People v Bladel (After Remand), 421 Mich 39; 365 NW2d 56

(1984), aff'd sub nom 475 US 625; 106 S Ct 1404; 89 L Ed 2d 631 (1986). Thereafter, that court shall also determine whether any error in the admission of that statement and the error in admitting the hearsay testimony of the social worker may be deemed harmless. In all other respects, leave to appeal is DENIED.

We do not retain jurisdiction.

(SEAL)

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 8, 1992 /s/ Corbin R. Davis
Clerk

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE
OF MICHIGAN, September 9, 1991

Plaintiff-Appellee,

v No. 120714

JAMES KING ANDERSON, III,

Defendant-Appellant.

---/

Before: Doctoroff, P.J., and Maher and Cavanagh, JJ.

PER CURIAM.

Defendant was convicted of first degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and sentenced to 50 to 75 years imprisonment. Defendant appeal as of right claiming that the trial court erred in its treatment and determination of the victim's competency to testify, in admitting testimony, and in instructing the jury. Defendant also claims prose-

cutorial misconduct denied him a fair trial. We affirm.

The victim in this case was defendant's daughter, who was nine years old at the time of trial. Defendant's first claim on appeal is that the trial court erred in administering the oath to the victim outside the presence of the jury, by improperly bolstering the child witness' credibility and by failing to give the child witness instruction. Defendant did not object to the procedure used and statement made by the trial court regarding the child witness' testimony. When issues are raised for the first time on appeal, or when a defendant fails to object at trial, this Court will grant review only if failure to do so would result in a miscarriage of justice. Petrus v Dickinson Co Board

of Comm'rs, 184 Mich App 282, 288; 457 NW2d 359 (1990); People v Seabrooks, 135 Mich App 442, 454; 354 NW2d 374 (1984). Further, the failure of a trial court to give a cautionary instruction will not be reviewed where no objection or request was made at trial unless this Court determines that justice requires review. People v Edwards, 35 Mich App 233, 235; 192 NW2d 382 (1971), lv den 388 Mich 784 (1972).

No miscarriage of justice will result from our failure to review this issue. Defendant's claim that the trial court erred by administering the oath to the witness outside the presence of the jury is without merit. Neither MCL 600.2163; MSA 27A.2163, nor MRE 603, require administration of the oath in the jury's presence. The trial court

instructed the jury regarding its duty to determine the credibility of witnesses and the weight to be given to testimony. The use of CJI 5:2:09 is no longer recommended and it has been deleted from the approved jury instructions. See CJI 2d 5.9. The trial court's statement that it was satisfied that the victim understood her obligations as a witness was not error.

Defendant's second claim is that the trial court erred in allowing a psychiatric social worker to testify as to the victim's hearsay statements under the medical treatment exception. MCR 803(4).

Hearsay is not admissible. MRE 802. MRE 803(4) provides an exception to the general rule of inadmissibility for "[s]tatements made for purposes of medi-

cal treatment or medical diagnosis in connection with treatment. . ."

In People v LaLone, 432 Mich 103, 437 NW2d 611 (1989), our Supreme Court held that statements of the identity of the perpetrator made to a psychologist during an examination following allegations of sexual abuse were not admissible under MRE 803(4). The Court reasoned that statements to psychologists are inherently less reliable than those made to physicians and that the hearsay statements identifying the perpetrator did not fall within the literal or intended purpose of MRE 803(4).

This case is distinguishable from LaLone on two grounds. First, the complainant in LaLone was defendant's fourteen-year-old stepdaughter. Com-

plainant here, defendant's natural daughter, was eight years old at the time the statements were made. Second, the statements in LaLone were made after the accusations had been made and a police investigation had begun. Here, the statements initiated the investigation. In addition, the statements were made during the psychiatric social worker's treatment of the child due to prior sexual assault of complainant by her stepbrothers. The circumstances surrounding the complainant's statements in this case support a finding that those statements are more reliable than the statements in LaLone. However, we are bound by the Supreme Court's decision to find that the hearsay testimony of the social worker was improperly admitted. Nevertheless, after review of

the record, we conclude that erroneous admission of this testimony was harmless. The testimony was cumulative to the child's in-court testimony. MCL 769.26; MSA 28.1096, MCR 2.613(A). See also People v Meeboer, 181 Mich App 365, 372-373; 449 NW2d 124 (1989), lv gtd 436 Mich 879 (1990).

Defendant's third claim is that the trial court erred by admitting testimony of other instances of sexual activity between complainant and defendant. Defendant did not object to the challenged testimony at trial. Hence, appellate review is waived absent manifest injustice. People v Norman, 184 Mich App 255, 258; 457 NW2d 136 (1990), lv den 437 Mich 971 (1991). Manifest injustice will not result. The evidence of prior sexual activity between defen-

dant and complainant was admissible under People v DerMartzex, 390 Mich 410; 213 NW2d 97 (1973). We reject defendant's argument that the DerMartzex rule did not survive adoption of the Michigan Rules of Evidence. People v Dreyer, 177 Mich App 735; 442 NW2d 764 (1989), lv den 434 Mich 865 (1990).

Defendant's fourth claim is that prosecutorial misconduct denied him a fair trial. Specifically, defendant argues that various comments made by the prosecutor tended to shift the burden of proof, bolster the credibility of the victim, appeal to the sympathy of the jury, represent the prosecutor's personal beliefs, and denigrate the truthfulness of both defendant and his counsel.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. People v Foster, 175 Mich App 311, 317; 437 NW2d 395 (1989). Questions involving prosecutorial misconduct are decided on a case-by-case basis and this Court must evaluate each question within the context of the particular facts of the case. People v Burnett, 166 Mich App 741, 754; 421 NW2d 278 (1988), lv den 431 Mich 900 (1988).

Defendant did not object to the majority of the more than twenty-five prosecutorial statements complained of on appeal. Review of the unobjected-to statements is precluded unless the prejudicial effect was so great that it could not have been cured by an appropriate instruction and failure to con-

sider this issue would result in a miscarriage of justice. Foster, supra. Having considered each of defendant's claims, we find that failure to review these alleged instances of misconduct will not result in a miscarriage of justice.

We now turn to the statements to which defendant objected. First, defendant argues that various comments by the prosecutor vouched for the credibility of the complainant. During the prosecutor's questioning of complainant, defendant objected on grounds that the prosecutor was seeking to impeach his own witness. The prosecutor replied that he was entitled to do that and "to boost her credibility by explaining the truth." The jury was excused and discussion was held in chambers. On the

record, the trial court stated only that the prosecutor was not going to proceed with the line of questioning. The prosecutor's statement did not bolster the credibility of the complainant and did not deny defendant a fair trial.

Defendant also objected to the prosecutor's statement during cross-examination of defendant that the prosecutor is a parent. After objection, the prosecutor reformulated his question. Although the statement placed irrelevant personal information about the prosecutor in front of the jury, we do not believe that the statement was so prejudicial that defendant was denied a fair trial.

Next, defendant claims that the prosecutor vouched for the credibility of

complainant by stating that complainant had repeated the allegations of abuse to the prosecutor half a dozen times. Defendant's objection this statement was sustained and the jury instructed to disregard the comment. Again, we do not believe the comment denied defendant a fair trial.

Second, defendant argues that the prosecutor improperly appealed to the jury's concern about social problems by referring to the National Enquirer. Defendant's objection was overruled and the prosecutor was cautioned. The context in which the statement was made concerned the fact that people read and hear all kinds of shocking stories and do not want to believe that such things happen. The prosecutor urged the jury to believe that sexual abuse of the com-

plainant had occurred. We reject defendant's claim that this statement improperly appealed to the jury's concern about social problems.

Finally, we reject defendant's claim that he was denied a fair trial due to the cumulative effect of the prosecutor's misconduct. While some of the comments present a close call, we are not convinced that, on the record as a whole, defendant was denied a fair trial. We do, however, caution the prosecutor to refrain from placing personal information before the jury, to confine his comments to the evidence presented and reasonable inferences arising from it, and to refrain from comments that can be interpreted as vouching for the credibility of his witnesses.

Defendant's fifth claim is that the trial court erred in admitting a statement made by defendant to Detective Gaultier. Defendant contends that the statement should have been excluded because defendant's attorney was not present when defendant was questioned and that defendant did not waive his right to counsel before speaking to the detective.

The statement was made while the detective drove defendant from Gaylord to Kalkaska following a polygraph examination which had been performed at defendant's request. There is no allegation that defendant sought counsel's presence during the questioning. The testimony is unrefuted that defendant was read his Miranda [Miranda v Arizona, 384 US 436; 86 S Ct 1602; 76 L Ed 2d 644

(1966)] rights and waived those rights prior to the polygraph examination. The Miranda rights were given and waived one hour before defendant made the statement at issue. The failure to reread Miranda rights prior to each interrogation does not render a defendant's subsequent statements inadmissible. People v Ray, 431 Mich 260; 430 NW2d 626 (1988); People v Godboldo, 158 Mich App 603; 405 NW2d 114 (1986). Having reviewed the record, we conclude that the decision to admit the statement was not clearly erroneous. People v Williams, 171 Mich App 234, 237; 429 NW2d 649 (1988).

Defendant's final claim is that the trial court erred in instructing the jury it could convict defendant by finding that either one of the alleged acts of penetration occurred. Defendant did

not object to the instruction at trial. Failure to object to jury instructions waives appellate review absent manifest injustice. People v Johnson, 187 Mich App 621, 628; ___ NW2d ___ (1991). Manifest injustice will not result here as there was no error. The trial court instructed the jury in accordance with CJI 20:2:01. That instruction allows the jury to find defendant guilty if it finds penetration into the complainant's anal or genital openings. There is no requirement that the jury unanimously agree on the location of the penetration. See Johnson, supra, pp 629-630.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Richard M. Maher

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v No. 120714

JAMES KING ANDERSON, III,

Defendant-Appellant.

---/

Before: Doctoroff, P.J., and Maher and Cavanagh, JJ.

CAVANAGH, J. (concurring)

Although I do not join in the majority's attempt to distinguish this case from People v LaLone, 432 Mich 103; 437 NW2d 611 (1989), I do agree that the testimony of the psychiatric social worker was improperly admitted, and would affirm for the sole reason that the testimony was cumulative to the victim's in-court testimony and was therefore harmless.

/s/ Mark J. Cavanagh